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No. 864.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

PETER PANNELL, *Petitioner,*

against

SS. *AMERICAN FLYER*, her engines, boilers, etc., and UNITED STATES LINES COMPANY, *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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In reply to respondent's brief, petitioner respectfully calls attention to a statement therein which is contrary to the precise language of the United States Carriage of Goods by Sea Act:

I. On pages 4-5 respondent states that Clause 2 of the bill of lading was required by the Act to be inserted in the bill of lading.

The fact is this was the respondent's "North Atlantic Services—West Bound, regular long form of bill of lading —WBNA—102." (Vol. I, page 33), meaning its regular bill of lading for shipments coming *to* a port of the United States.

The Act (46 U.S.C. §1312), quoted by respondent on page 5, requires the Paramount Clause *only* for shipments *from* ports of the United States. Clause 2 of the bill of lading is, therefore, a voluntary incorporation of the Act

by the carrier and an obvious intention on its part to be bound by the terms of the Act.

Furthermore, the Act does not require, at any time, the language of Clause 2, which reads:

> "If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent but no further."

Petitioner also emphasizes the following points:

II. The quote from bill of lading Clause 2 on page 3 of respondent's brief is *not* a true quotation from the bill of lading in this case. It is merely respondent's wish that Clause 2 did contain the italicized exception.

Respondent's argument that it has the economic power, if it wishes, to change any term of the bill of lading so as to circumvent a decision of this Court, as a theory, is unimportant to this Court's jurisdictional requirements. As a fact, it is only important on the merits, being an example of *brutem fulmen*, which is within the carrier's capacity. However, like all contracts, this one is subservient to the law.

Furthermore, all indications are that the carrier would rather have the Act cover on-deck shipments than to have it held an insurer under the General Admiralty Law.

III. On page 5, respondent argues that Clause 2 does not make any reference to on-deck shipments, but if it was meant that the Act should not apply to this shipment, it could have been excluded in Clause 2, as the carrier's counsel suggests, on page 3, he will do in the future.

If Clause 2 did not apply the Act to this shipment, it was an insensible incorporation.

IV. The respondent is merely picking and choosing the most favorable clauses in the bill of lading to suit the occasion, which it obviously cannot do, since Clause 2 refers to

the bill of lading as a complete document and not a piecemeal, self-serving instrument.

V. The entire Act was incorporated in Clause 2 of the bill of lading. Clause 13 incorporated §1304(5) of the Act as a limitation and Clause 23 repeats substantially the same section. The Lower Courts both held that the bill of lading incorporated the Act.*

VI. On page 5, respondent attempts to give the impression it did not seek to have the benefits of the limitations referred to in Clause 13.

The fact is it pleaded in its answer (Vol. 1, page 12) that the Court apply §1304(5) of the Act, the same section petitioner relies on.

For the Foregoing Reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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* The Court of Appeals held (App. to petition, page 36):

"• • • However, the bill of lading refers to the Carriage of Goods by Sea Act and the question for decision is what is the legal effect of such reference.

"Where a statute is incorporated by reference its provisions are merely terms of the contract evidenced by the bill of lading. • • •"

See the District Court's opinion (App. to petition, page 16, *et seq.*).